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## WISCONSIN LEGISLATIVE COUNCIL AMENDMENT MEMO

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<b>2003 Assembly Bill 2</b>	<b>Senate Substitute Amendment 1 and Senate Amendments 1 and 2 to Senate Substitute Amendment 1</b>
<i>Memo published: June 20, 2003</i> <i>Contact: Nick Zavos, Staff Attorney (266-1308)</i>	

### CHAPTER 109

#### Background

Under *current state law*, the Department of Workforce Development (DWD) or an employee may bring an action to collect unpaid wages. DWD or an employee has a lien upon all property of the employer, real or personal, located in this state. The lien is for the full amount of any wage claim or wage deficiency. [s. 109.09 (2) (a), Stats.] If DWD or the employee does not bring an action to enforce the lien within two years, the lien ceases to exist. [See s. 109.09 (2) (b) and (c), Stats.]

A wage claim lien under ch. 109 is a “superpriority” lien. With two exceptions, it has priority over all liens or debts regardless of when the lien or debt arises. The amount of lien entitled to priority is unlimited, and the wages may date back in time as long as two years from when the wages were due. The exceptions to this superpriority status are: (1) liens of financial institutions that originate before the wage claim lien; and (2) liens relating to costs of certain environmental remediation expenses incurred by the state. [See s. 109.09 (2) (c), Stats.]

#### Definition of Employee

Senate Substitute Amendment 1 changes the definition of “employee” for all of ch. 109 to exclude a larger class of workers. **Under current law**, s. 109.01 (1r) defines “employee” for the purposes of ch. 109. Under the current definition, “employee” excludes: (1) an officer or director of a corporation; (2) a member or manager of a limited liability company; (3) a partner of a partnership or joint venture; and (4) the owner of a sole proprietorship. The **substitute amendment** adds three other groups to the list of excluded workers: (1) an independent contractor; (2) a person employed in a managerial, executive, or commissioned sales capacity; and (3) a person employed in a capacity in which the person is privy to confidential matters involving the employer-employee relationship. Unlike the rest of the changes that the substitute amendment makes to ch. 109, the change in the definition of “employee” affects more than wage claims. The new group of excluded workers would also be

excluded from all of the provisions of ch. 109, Stats., including requirements as to when employees must be paid and plant closing laws.

**Lenders Who Have Precedence After the First \$3,000**

Under **current law**, one of the exemptions to the wage lien's superpriority status is for liens of financial institutions that arose before the wage lien took effect. A "financial institution" is defined as a bank, savings bank, savings and loan association, or credit union that is authorized to do business under state or federal laws relating to financial institutions. [ss. 69.30 (1) (b) and 109.09 (2) (c), Stats.]

**Senate Substitute Amendment 1** expands the group of lenders who take precedence over a wage lien from financial institutions to "commercial lending institutions." The substitute amendment does not define the term "commercial lending institution."

**Senate Amendment 2** to the **Senate Substitute Amendment 1** defines the term "commercial lending institution" as having the same definition as "financial institution" as in s. 234.01 (5k). That subsection defines a financial institution as "a bank, savings bank, savings and loan association, credit union, insurance company, finance company, mortgage banker registered under s. 224.72, community development corporation, small business investment corporation, pension fund or other lender which provides commercial loans in this state."

**\$3,000 of Wages Within Last Six Months**

**Senate Substitute Amendment 1** creates an exception to the priority given to the commercial lender's prior lien. A wage lien will take precedence over the lien of a commercial lender that originated before the wage lien took effect "only to the extent" that the wage lien is: (1) for unpaid wages of \$3,000 or less; and (2) earned within the six months preceding either the date on which the employee files a wage claim with DWD or the date the employee brings his or her own action to collect the wages.

There are two ways to interpret how the "to the extent" language interacts with the \$3,000 limit. The first and more likely interpretation is that \$3,000 of the wage lien would be paid to the employee first, before the commercial lenders. After the employee is paid \$3,000, the commercial lenders would be paid the full amount of their liens. Then, after the commercial lenders are paid in full, the employee would be paid the remaining amount of the wage lien, if any.

The second way to interpret the "to the extent" language is that it limits the type of liens that are given any priority over commercial lenders. Under this interpretation, only a lien that is for wages of \$3,000 or less earned within the appropriate time period would be given first priority. Under that interpretation, a lien for \$6,000 of unpaid wages would be paid, in its entirety, after the lien of a financial institution.

**Senate Amendment 1** to **Senate Substitute Amendment 1** changes the wording of the sentence in proposed s. 109.09 (2) (c) 2. in favor of the first option to make it clear that the first \$3,000 of a wage lien will take precedence over a commercial lender. The amendment deletes the "to the extent language." Instead, the sentence states that a wage lien will take precedence over a prior lien of a commercial institution "as to the first \$3,000 of unpaid wages covered under the lien" earned within the

six months preceding the date the employee files a wage claim with DWD or the date the employee brings his or her own action to collect the wages.

### **Applicability**

**Senate Substitute Amendment 1** has several provisions affecting when the changes would take effect. The substitute amendment would affect no current financial institution liens. The amendment provides that a lien of a financial institution that exists on the day before the effective date of the bill would still take precedence over a wage lien. In addition, the amendment specifies that any money advanced by a financial institution after a wage lien takes effect would take precedence over that wage lien if the money was advanced under a contract entered into before the effective date. This includes any extension or renewal of such a contract.

The liens of commercial lenders other than financial institutions would take precedence over any wage liens created after the effective date of the bill. Any wage lien that exists on the day before the effective date of the bill still takes precedence over liens of commercial lenders other than financial institutions, regardless of when the commercial lender's lien originated.

### **ARTICLE 9 OF THE UNIFORM COMMERCIAL CODE**

Wisconsin's version of Article 9 of the Uniform Commercial Code is contained in ch. 409. Under **current s. 409.617**, when collateral is disposed of by a secured party pursuant to a debtor's default, all subordinate liens and security interests are discharged *except* for liens held by the state or a local governmental unit. [s. 409.617, Stats.]

Current ch. 409 was created by 2001 Wisconsin Act 10. It has been in effect since July 1, 2001. Before Act 10, when collateral was disposed of by a secured party pursuant to a debtor's default, all subordinate liens and security interests were discharged *including* liens held by the state or a local governmental unit. [s. 409.504 (4), 1999 Stats.] As originally drafted, Assembly Bill 2 would have changed the law to how it was before Act 10. The bill was amended on the Assembly floor to remove the change to s. 409.617 and retain the current exemption for state and local government liens.

**Senate Substitute Amendment 1** puts the change to s. 409.617 back in the bill so that when collateral is disposed of by a secured party pursuant to a debtor's default all subordinate liens and security interests are discharged *including* liens held by the state or a local governmental unit.

### **LEGISLATIVE HISTORY**

Senate Substitute Amendment 1 was adopted by the Senate Committee on Agriculture, Financial Institutions and Insurance on June 16, 2003 on a vote of Ayes, 3; Noes, 2.

Senate Amendments 1 and 2 to Senate Substitute Amendment 1 were adopted by the Senate Committee on Agriculture, Financial Institutions and Insurance on June 16, 2003 by a vote of Ayes, 4; Noes, 1.

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